In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MOTION TO MODIFY THE ORDER OF THE COURT

In responding to the petition for rehearing in this case, we addressed ourselves solely to the considerations which, in our view, supported the disclosure policy of the Department of Justice—that is to say, the policy of disclosing electronic surveillance only when an examination of the fruits of that surveillance revealed that information arguably relevant to the case at issue had been obtained.

In granting the petition and vacating the judgment herein, the Court has accepted petitioner's argument that the Department of Justice should not be empowered to make that determination for itself. We do

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not seek to reargue that question and accept as settled by the Court's order the proposition that here, as in other areas, decisions affecting the rights of the defendant should be subjected to "detached scrutiny by a neutral magistrate." *Katz* v. *United States,* No. 35, this Term, decided December 18, 1967, Sl. Op., p. 9.

Because we viewed the government's policy to be in accord with the principles relating to the prosecutor's duty in criminal cases as set forth in prior opinions of this Court, we did not address ourselves to the question of the procedure that should be adopted if the Court were to find that our policy did not adequately protect the rights of the defendant. Since we believe that this procedural question is an important one, we file this motion to ask the Court to consider the matter further and to modify its order.

The *per curiam* decision of the Court indicates that the cause is to be remanded to the district court for the conduct of an adversary proceeding. This might be construed to require, in cases of this kind, that the government deliver to defense counsel and the district court the logs of all monitored conversations in which the defendant was involved, and that a hearing should then be held to determine if the conviction was tainted by the use of evidence improperly obtained. We submit, however, that there are sound practical reasons why it would be better practice to require the government to submit the logs preliminarily for an *in camera* inspection by the district judge. This would not of course preclude the district judge from conducting further proceedings in instances where he found that a legitimate purpose might be served thereby.

On its face, the Court's opinion sets forth the principles which should govern disclosure by the government in all cases where there has been illegal electronic surveillance of a defendant's premises or conversation.[1] Conversations overheard by means of such surveillance may include the most arrant gossip—gossip having no conceivable relationship to any judicial proceeding. More often than not, the talk or gossip will involve or relate to third persons wholly unconnected with the case. Although particular items picked up by the surveillance may have no claim whatever to either truth or relevancy, they may have a high potential to cause embarrassment or serious injury. Disclosure in the context of an adversary proceeding, even assuming an effort to employ safeguards,[2] would seem an unnecessary risk in circumstances where the district judge can readily determine that the material in question is utterly irrelevant to the case before him.

We submit that an *in camera* examination of the records of any illegal eavesdropping by the trial judge, who could then order the production of any arguably relevant portions, would adequately protect the interests of the defendant. The government would in no sense be the judge in its own case; yet the danger of public disclosure of irrelevant and scan-

[1] There may be added considerations in cases involving national security. See Memorandum in Response to Motion to Amend the Petition for Certiorari in *Butenko* v. *United States* and *Ivanov* v. *United States*, No. 1007 Misc. and No. 885. See, also, concurring opinion of Mr. Justice White, *Katz* v. *United States*, supra.

[2] Attempts by the government to provide safeguards in the form of protective orders have not been uniformly successful.

dalous information concerning third parties would be minimized.[3]

There is clear precedent for a procedure which places upon the district judge the responsibility for determining when information which the government possesses may be relevant to the defense.[4] Thus, in applying the Jencks Act (18 U.S.C. 3500), this Court has stated that "when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an

[3] During the trial and appellate proceedings in this case it was discovered that certain conversations involving the defendant Kolod were overheard during the course of an illegal surveillance at the Desert Inn. The logs of those conversations were turned over to the district judge for an *in camera* inspection. When the trial judge determined that there was nothing in them that should be disclosed to the defense, they were sealed and made part of the record. These logs, which were reviewed by the court of appeals and are part of the record before the Court in this case, contain scandalous references to third parties.

[4] As noted above, this was the procedure adopted at an earlier stage in this proceeding when it was discovered that there had been electronic surveillance at the Desert Inn which involved Kolod. See the opinion of the court below, 371 F. 2d 983. Similarly, subsequent to the remand in *Hoffa* v. *United States*, 387 U.S. 231–234, the government, in addition to the conversation revealed in this Court, submitted to the district court for *in camera* inspection other conversations obtained by electronic surveillance which the government considered not arguably relevant. The district judge then determined that the materials submitted for *in camera* inspection "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted." See *United States* v. *Hoffa, et al.*, 273 F. Supp. 141, 143 (N.D. Ill.). The court then resealed the exhibit so that it would be available for review by the court of appeals.

in camera determination." *Palermo* v. *United States,* 360 U.S. 343, 354. Similarly, where the production of grand jury minutes is involved, the Court has recognized that it is one of the trial judge's functions "to cause the elimination of extraneous matter * * *." *Dennis* v. *United States,* 384 U.S. 855, 875. A close analogy is also provided by Rule 16(e) of the Federal Rules of Criminal Procedure which authorizes the district judge to deny a defendant pre-trial discovery on the basis of the judge's *in camera* examination of materials submitted by the government.

There is no reason to believe that a procedure for *in camera* inspection by the district judge will be any less effective a means of protecting the defendant's rights in the situation presently before the Court than it is in the above instances. Here, too, the Court may be "confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral determination of the prosecuting arm of the Government." *Palermo* v. *United States,* 360 U.S. 343, 361 (Brennan, J., concurring). Moreover, appellate review may be obtained in the same manner as in Jencks Act cases, *i.e.,* the material not disclosed may be sealed by the court and made part of the record to be submitted to the appellate court. See *Palermo* v. *United States, supra.*

For the foregoing reasons it is respectfully submitted that the Court's order of January 29, 1968, should be modified to provide that the cause be remanded for an *in camera* examination of all logs reflecting conversations involving petitioners and for

such further proceedings as the district judge may deem necessary and appropriate as a result of that examination.

ERWIN N. GRISWOLD,
Solicitor General.

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